

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSA LUNA)	
Claimant)	
)	
VS.)	
)	
WESTERN UNIFORM & TOWEL SERVICE)	
Respondent)	Docket No. 1,024,187
)	
AND)	
)	
EMCASCO INS. CO.)	
CONTINENTAL WESTERN INS. CO.)	
TRI-STATE INS. CO.¹)	
CLERMONT INS. CO.²)	
VIRGINIA SURETY)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier Continental Western Insurance (Continental) requested review of the January 10, 2007 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on April 25, 2007.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. Douglas D. Johnson, of Wichita, Kansas, appeared for the respondent and Continental³. Ronald J. Laskowski, of Topeka, Kansas, appeared for the respondent and Emcasco Insurance Company

¹ Tri-State was provided with notice of all proceedings, but provided no response.

² Clermont was provided with notice of all proceedings, but provided no response.

³ Continental Western Ins. Co. provided coverage from July 1, 2002 to July 1, 2005 and paid 1 week of temporary total disability and \$4,811.60 in medical benefits.

(Emcasco).⁴ John C. Kennyhertz, of Overland Park, Kansas, appeared for respondent and Virginia Surety (Virginia Surety).⁵

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, all parties agreed that claimant's average weekly wage is no longer in dispute. They also all agree that the date of accident is no longer in dispute. Thus, while the nature and extent of claimant's impairment remains at issue, respondent and its carriers agree that October 14, 2004 is the correct and appropriate date of accident.

ISSUES

The ALJ concluded claimant suffered a series accidents culminating in bilateral hand injuries on October 14, 2004, and awarded 1 week of temporary total disability and a 19 percent whole person impairment. As respondent's insurer on the risk as of October 14, 2004, Continental was found responsible for payment of the entire award.

The respondent and Continental requested review of the nature and extent of claimant's injury or injuries, specifically whether claimant's bilateral hand condition constitutes two separate scheduled impairments or a single whole body impairment based upon *Pruter*⁶ and the Kansas Supreme Court's recent pronouncement in *Casco*.⁷ At oral argument counsel for respondent and Continental conceded it no longer wished to advance the argument that claimant's left upper extremity complaints have yet to accrue in an "accident" and are the responsibility of the subsequent carrier(s). Thus, the sole argument it asserts in this appeal stems from the nature and extent of claimant's bilateral hand complaints and the method of computation.

Claimant, Emcasco and Virginia Surety all contend the ALJ should be affirmed in all respects. Alternatively, claimant concedes that if *Casco* is to be followed, separate functional impairments for each of the upper extremities should be awarded. And based upon the opinions expressed by Dr. Murati, claimant's permanent impairment to her right upper extremity should be 24 percent and 10 percent to the left.

⁴ Emcasco Ins. Co. provided coverage July 1, 2000 to July 1, 2002 and paid no benefits in this case.

⁵ Virginia Surety provided coverage from July 1, 2005 to July 1, 2006 and paid no benefits in this case.

⁶ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

⁷ *Casco v. Armour Swift-Eckrich*, ____ Kan. ____, 154 P.3d 494 (2007), *reh. denied* (May 8, 2007).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In the Award, the ALJ succinctly and accurately set forth the facts relevant to this claim and the Board adopts that statement as its own, repeating only those facts necessary to its opinion.

Given the parties stipulation as to the date of accident, the sole issue to be addressed by this appeal is the nature of claimant's impairment and the methodology used to calculate the benefits owed. Respondent and Continental urge the Board to follow the Court of Appeal's analysis as expressed in *Pruter*⁸ and modify the claimant's award from a whole body impairment to that of two schedules, in line with the testimony offered by Dr. Lucas, the treating physician. Respondent and Continental further argue that the principles expressed in *Pruter* were further solidified in the Kansas Supreme Court's recent pronouncement in *Casco*.⁹

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d. When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the

⁸ *Pruter*, 271 Kan. 865.

⁹ *Casco*, ___ Kan. ___, *reh. denied* (May 8, 2007).

presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d. K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.¹⁰

Here, claimant sustained bilateral, parallel simultaneous injuries to her upper extremities. Both of those extremities are listed in K.S.A. 44-510d. And there is no contention that she is presently permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. Accordingly, the ALJ's Award is hereby modified to reflect two separate scheduled injuries rather than a whole body impairment as a result of claimant's work-related accident.

In this instance, Dr. Murati assessed the claimant with a 10 percent permanent partial impairment to the right upper extremity for the carpal tunnel complaints (post surgery) along with 20 percent to one finger and 40 percent to another for tenosynovitis. When combined, this yields a 24 percent impairment to the right upper extremity. Dr. Murati assigned a 10 percent to claimant's left upper extremity for her left carpal tunnel complaints. In contrast, Dr. Lucas assigned a 7 percent to the right upper extremity and 5 percent to the left upper extremity.

Counsel for the parties have pointed out weaknesses in both physicians' opinions, most notably Dr. Lucas' acknowledgment that he routinely rates "low" and the fact that Dr. Murati was hired by the claimant to provide a rating. After considering both opinions, the Board finds that an average of the ratings provided by both these doctors is a reasonable approach. Thus, the Award is modified to reflect a 15.5 percent permanent partial impairment to the right upper extremity at the level of the hand and 7.5 percent permanent partial impairment to the left upper extremity at the level of the hand.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 10, 2007, is modified as follows:

The claimant is entitled to 1.00 week of temporary total disability compensation at the rate of \$318.18 per week in the amount of \$318.18 followed by 23.10 weeks of permanent partial disability compensation, at the rate of \$318.18 per week, in the amount of \$7,349.96 for a 15.50 percent loss of use of the right hand, making a total award of \$7,668.14.

¹⁰ *Id.*, Syl. ¶¶ 7-10.

The claimant is also entitled to 11.25 weeks of permanent partial disability compensation, at the rate of \$318.18 per week, in the amount of \$3,579.53 for a 7.50 percent loss of use of the left hand.

IT IS SO ORDERED.

Dated this _____ day of May 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: R. Todd King, Attorney for the Claimant
Douglas D. Johnson, Attorney for Respondent and Continental Western
Ronald J. Laskowki, Attorney for Respondent and Emcasco
John Kennyhertz, Attorney for Respondent and Virginia Surety
Nelsonna Potts Barnes, Administrative Law Judge